principles. In addition to the quotation to this effect from a Texas authority which was cited by the Court below (R. 138), the following Texas decisions are also pertinent: *Cartwright v. Trueblood*, 90 Tex. 535, 39 S. W. 930; *Klein v. Humble Oil and Refining Co.*, 67 S. W. (2d) 911; *Gilbert v. Smith*, 49 S. W. (2d) 702; *Jones v. Bedford*, 56 S. W. (2d) 305; *Smith v. Schlittler*, 66 S. W. (2d) 305. These and similar decisions have been summarized as follows in the standard text-book on Texas oil and gas law:

"The rule of construction favoring the grantee is the last one the court should apply, and should not be resorted to so long as satisfactory results can be secured by the application of other rules of analysis and construction . . ." Thuss, Texas Oil & Gas (2nd Ed.), pp. 46-47.

In the case at bar, the Court below found that the language of the deed and the obvious intention of the parties as expressed therein negatived the existence of the ambiguity which Petitioner sought to raise, and, hence, that there was neither need nor authority for the application of the principle of construction favoring the grantee. (R. 137-138.) In light of the foregoing authorities, it is submitted that this decision was eminently correct and that Petitioner is in the somewhat anomalous position of saying that the Court below should have discarded all principles of construction save and except the only one which might have bolstered Petitioner's contentions.

Except for the decisions cited by Petitioner on pages 14-20 of its Argument with respect to the ele-

mentary principles concerning ownership of oil in place, the nature of a Texas mineral lease, etc., and except for the one case quoted on pages 20-21 with respect to the above-mentioned canon of construction, Petitioner sets forth no authority whatsoever in support of its contention that the decision of the Court below was "in conflict with applicable local decisions" and that the result of the case below was "different from what would have been the result in the State Courts." Not one decision cited by Petitioner deals with a mineral deed or a mineral reservation which is even remotely comparable to that contained in the deed in question. Certainly if "applicable local decisions" exist, and if the decision below might possibly be in conflict with them, this Honorable Court is entitled to know what such decisions are in order that it may exercise its judgment as to jurisdiction pursuant to Rule 38(5b) and may enter the proper judgment with respect to the merits of the case. Certainly, also, Petitioner has failed to demonstrate that any "applicable local decisions" are in conflict with the decision below, and in seeking a writ of certiorari from this Honorable Court, Petitioner has done nothing more than to state certain general principles—each of which was recognized and applied by the Court below—and to attempt to persuade this Court to make the mighty leap between such principles and a conclusion that this Court should assume jurisdiction of the instant case and should render a judgment different from that which was rendered below.

As Respondents shall demonstrate in the succeed-

ing subdivision of this Argument, there are Texas decisions which are "applicable" to the instant case —decisions which construe factual situations which are virtually identical to that presented in the case at bar, and decisions which establish conclusively the correctness of the judgment of the Circuit Court of Appeals.

2.

Under the heading "Analysis of the Circuit Court of Appeals' Opinion," Petitioner posits and discusses an alleged "contradiction in premises" in the opinion of the Court below—a "contradiction" which, like the straw-man of the logicians, is first erected and then destroyed by Petitioner. The non-existence of such a contradiction doubtless can best be perceived by ascertaining what the Circuit Court actually held and why it so held.

The portions of the deed in question which are here in controversy are reprinted on pages 6-9 of the Record, and may also be found on pages 131-132 thereof and on pages 10-12 of Petitioner's Argument in Support of its Petition for Certiorari. Consequently, the deed will not be re-copied herein, and references to the deed in this Argument will conform to the paragraph numbers employed in the above-mentioned printings of such deed.

As its first step in considering the deed, the Circuit Court held that it conveyed to the grantee (the predecessor in title of Petitioner) all of the surface estate in the property in question, together with ownership of 5% of the oil in place, and that the grantor

(the predecessor in title of Respondents) retained ownership of 95% of the oil in place. (R. 134-135.) Here was a clear recognition and application by the Circuit Court of the Texas "ownership in place" doctrine, and here, too, is a clear refutation of Petitioner's contention that the Court failed to apply such doctrine.

Because of the split ownership of the oil in place, the Court next announced that the grantor and the grantee stood in the position of co-tenants with respect to such oil—a holding which necessarily followed from *Way v. Venus*, 35 S. W. (2d) 467, and the other Texas authorities collated in 31 Texas Jurisprudence 555-556. (R. 134-135.)

Following this, the Court below called attention to Paragraph 6 of the deed whereby the grantor and its successors received the power to sell the "whole of the oil," and the Court correctly noted that the possession of this power was in addition to the grantor's powers and privileges as a co-tenant of such oil. (R. 135.)

The consequences which flow from a co-tenancy of minerals which is coupled with a power of sale are well defined by decisions of the Texas Courts, and the judgment herein by the Circuit Court is in full accord with such decisions. In the case of *Gill v. Bennett*, 59 S. W. (2d) 473 (error refused by Texas Supreme Court), Jones conveyed to Bennett an undivided 1/16 mineral interest in an undivided 80 acres in a section containing 640 acres, or an undivided 1/128 mineral interest in the section. Subsequently, Jones executed an oil and gas lease cover-

ing this section and reserving the usual 1/8 royalty. Bennett ratified the lease after its execution, and the controversy between the parties was as to whether Bennett was entitled to 1/128 of *all* of the oil and gas produced from the property, or whether he was entitled to only 1/128 of 1/8 or 1/1024 of the total production. In holding that Bennett was entitled to only 1/1024 of total production (i. e., 1/128 of the reserved royalty of 1/8), the Court said:

"If Bennett did ratify the oil and gas lease, it operated as effectively as if he had originally joined in the same and passed to Gill (the lessee) 7/8 of the oil and gas in the section subject to the terms and conditions of the lease.

"If there was such ratification, then Bennett is a participating royalty owner and entitled to 1/128 of the oil and gas royalty agreed to be paid by lessee (or 1/128 of 1/8).

"On the other hand, if there was no such ratification, then Bennett is non-participating in the royalty, but is entitled to 1/128 interest in all of the oil and gas produced from the whole section."

As can be seen from this quotation, the Court decided the case upon the question of whether or not Bennett could be said to have "participated" in the lease. If he did participate, he was entitled to only 1/128 of the 1/8 reserved royalty; if he did not, he was entitled to 1/128 of total production. In that case the Court found "participation" by ratification of the lease, and drew an analogy between such situation and a situation in which Bennett might have "participated" by joining in the lease originally.

Equally analogous is the case at bar. In this case, the Respondents own 95% of the oil in place and Petitioner owns 5%. However, in addition to their ownership of the oil in place, Respondents also possess the power to sell the "whole of the oil" (a power which, as will be shown below and as is admitted by Petitioner, includes the power to execute a mineral lease covering the whole of the oil). Consequently, whenever Respondenst exercise their power of sale by leasing the property, Petitioner necessarily "participates" in the lease and Petitioner's interest passes under such lease. Under the holding of Gill v. Bennett, this "participation" confers upon Petitioner the right to only 5% of the royalty reserved in the lease, rather than 5% of total production—a conclusion which accords squarely with the decision of the Circuit Court in this case.

Similar in facts and result is the case of *Theo Oil Co. v. Thomas, et al.*, 108 S. W. (2d) 555, cited with approval by Chief Justice Alexander in *Murphy v. Dilworth, et al.*, 151 S. W. (2d) 1004. In this case an undivided 1/24 mineral interest was conveyed to one Carter and was by him in turn assigned to the Theo Oil Company. Prior to the deed, the grantor had executed an oil and gas lease on this property, and again the question was whether the Theo Oil Company was entitled to 1/24 of all of the oil and gas produced or was entitled to only 1/24 of the 1/8 reserved royalty or 1/192 of the total royalty. In holding that the oil company was entitled to but 1/192 of the total royalty, the Court said:

"We are of the opinion that the deed conveyed to Theo W. Carter a 1/24 of the royalty, which is a 1/192. In the case of Gill v. Bennett (Tex. Civ. App.), 59 S. W. (2d) 473, a mineral deed was executed conveying an undivided 1/16 interest in an undivided 80 acres of a 640 acre tract. Thereafter a lease was executed, the grantee in such deed joined in the subsequent lease, or at least ratified the lease. He made the contention that he was entitled to a 1/128 of the minerals in the whole 640 acre tract. He was decreed 1/1024 interest in the royalty of the whole tract. Writ of error was refused in this case.

"We can see no difference in a conveyance of an undivided 1/24 interest in the minerals in place out of a tract of land upon which there is an outstanding oil and gas lease, and the holder of a 1/24 undivided interest of the minerals in place who thereafter joins in the execution of an oil and gas lease. In either event as to the royalty he would be entitled to receive a 1/24 of the 1/8 royalty and not a 1/24 of the entire mineral production, in the absence of a reservation of such royalty."

In the case of *Murphy v. Dilworth, et al.*, 151 S. W. (2d) 1004 (Texas Supreme Court), the grantors in a deed reserved "an undivided one-sixteenth interest and estate in and to all of the minerals of every character, including oil and gas, in, under and appertenant to all of the above described property" for a period of fifteen years. The usual lease was then in effect with respect to this property. The trial court and the Court of Civil Appeals held this reservation to be ambiguous, and, upon the introduction of parol evidence, held that the reservation was of 1/16 of all of the royalty, or 1/2 of the 1/8 royalty reserved in the

lease in effect at the date of the deed. In reversing the decisions of these courts, the Supreme Court, speaking through Chief Justice Alexander, held that the reservation was unambiguous and that, properly construed, it entitled the grantors to only 1/16 of the reserved 1/8 royalty. In so holding, the Court observed that:

"The reservation contained in the deed appears on its face to be plain and unambiguous. In clear language it reserves an undivided 1/16 interest in the minerals in and under said land, and makes no reference whatsoever to any royalty to be paid under any existing or subsequent lease."

Similarly, in the deed involved in this cause, nothing can be found to show that Petitioner possesses anything other than a 5% undivided mineral interest. Petitioner holds everything which Respondents' predecessor in title did not reserve, and since such predecessor plainly reserved a 95% undivided mineral interest, it necessarily follows that Petitioner holds only a 5% undivided interest. Indeed, the facts in the instant case are even stronger than those in Murphy v. Dilworth, for in addition to the absence of language indicating that Petitioner holds other than a 5% undivided interest, there is the affirmative statement in Paragraph 6 of the deed that upon a sale of the whole of the oil in place (which sale, as will be shown, includes a mineral lease), Petitioner shall be entitled to but 5% of the consideration received.

In the case of *Starling v. Preston, et ux.*, 155 S. W. (2d) 1009 (error dismissed) one Lovett conveyed to

Preston 1/16 of the oil and gas in certain property, retaining 15/16. Subsequently, Lovett's interest became vested in a trustee who executed a lease which conveyed the oil and gas in the property. Although Preston did not join in this lease, and although the trustee had no power to lease Preston's interest, Preston subsequently made a settlement with the lessee and confirmed the lease. In holding that Preston was entitled to only 1/16 of the 1/8 royalty under this lease, rather than 1/16 of the total production, the Court stated:

"The deed from Lovett to Preston was correctly construed as vesting in Preston a full 1/16 of all the oil and gas minerals in and under the land. The remaining 15/16 was retained in Lovett, which by mesne conveyance from and under Lovett became vested in the trustee. If Preston and the trustees had then joined in a lease conveying the 7/8 leasehold interest covering the land, clearly they would have owned the remaining 1/8 royalty interest in like proportions as they originally owned all the minerals, that is to say, that Preston would have owned a 1/16 of the 1/8 royalty interest and the trustee 15/16 of the 1/8 royalty. Preston did not join the trustee in the original execution of the lease conveying to the Arkansas-Louisiana Gas Company the 7/8 leasehold interest covering the land. So at the time he filed his suit against the trustee and the Arkansas-Louisiana Gas Company, Preston was entitled to recover of said defendants his full 1/16 interest in and to all the minerals in said land. But plaintiffs and intervener compromised and settled with the Arkansas-Louisiana Gas Company as to the 7/8 leasehold interest, which amounted to a ratification and confirmation of the lease and its legal effect was equivalent to

joining in its original execution. Therefore, at the time plaintiffs and intervener went to trial against the trustee they were entitled to recover 1/16 of the 1/8 royalty interest, and not 1/2 of the 1/8 royalty interest as was the effect of the judgment rendered."

Here again the facts in the instant case are indistinguishable in effect. Under the terms of the deed in question, and through mesne conveyances, Respondents own an undivided 95% interest in the oil, and Petitioner possesses an undivided 5%. If both were to join in the execution of an oil lease, in the words of the Court "clearly they would . . . own . . . the remaining 1/8 royalty interest (reserved in the lease) in like proportions as they originally owned all the minerals," that is to say, Respondents would own 95% of the 1/8 royalty, and Petitioner would own the remaining 5% of the 1/8 royalty. Moreover, since Respondents possess the power to lease the land without joinder of Petitioner, and since any such lease passes a proportionate part of Petitioner's interest as well as that of Respondents, the effect is the same as if Petitioner had joined in such lease, or subsequently ratified it, and the respective shares of Respondents and Petitioner would remain the same as last set forth above. Again, this result is in full accord with that reached by the Circuit Court.

In the recent case of *Richardson v. Hart*, 185 S. W. (2d) 563, the grantors conveyed "an undivided 1/16 of 1/8 interest in and to all of the oil, gas and other minerals" on certain lands, such lands being then subject to an oil and gas lease, and the conveyance being made subject to this lease, but covering

and including "1/16th of 1/8th of all of the oil royalty, and gas rental of royalty due and to be paid under the terms of said lease." In the trial court and in the Court of Civil Appeals, this conveyance was held to vest in the grantee 1/16 of 1/8 of all of the royalty, or 1/128. In reversing these decisions and in holding that the grantee was entitled to but 1/ 16 of 1/8 of the 1/8 reserved royalty, or 1/1024 of the total royalty, the Supreme Court observed:

"Without any stipulation as to royalties the interest thus conveyed would carry with it *by operation of law* the right to 1/128 of the royalties paid under any lease (or 1/1024 of the total royalties). However, the parties did not leave the matter of the payment of royalties under the existing lease to be determined *by operation of law.* In the third paragraph of the deed they made a covenant in regard thereto which passed to the grantee the second estate above mentioned. The fact that it fixes the share in the present royalties the same as would have obtained by operation of law does not lessen its force and effect as a conveyance. (Explanatory figures in parentheses added, together with italics.)

Thus, here again we find a recognition by the Supreme Court that a co-tenancy in a mineral estate in Texas carries with it "by operation of law" only the right to a proportionate part of the royalties paid under a lease, rather than the right to a proportionate part of total production. Moreover, it is interesting to note that in the instant case, as in Richardson v. Hart, the parties to the conveyance expressly set forth therein the proportions which they were to

receive—as was done by the provision of Paragraph 6 of the deed in question which provided that 5% of the purchase price upon sale should go to the grantee—and that, in the words of the Supreme Court, the fact that such provision "fixes the share in the present royalties the same as would have obtained by operation of law does not lessen its force and effect as a conveyance."

In the case of *Watkins, et ux. v. Slaughter, et al.*, 183 S. W. (2d) 474, the grantor reserved a "1/16 interest in and to all of the oil, gas and other minerals in and under and that may be produced from said land," providing, however, that he should receive no part of the money rental or bonus paid on any future lease, conferring upon the grantee the power to lease such land, and stating that in such event the grantor "shall receive the royalty retained herein only from actual production of oil, gas or other minerals on said land." Subsequently, the grantee leased the land, and the usual controversy arose as to whether the grantor was entitled to 1/16 of the total royalty, or 1/16 of the ⅛ royalty reserved in the lease. The trial court held that the grantor was entitled to 1/16 of the total royalty. In examining this question, the Court of Civil Appeals correlated the authorities and stated the problem before it as follows:

"Applying the law, as thus expressed, to the instant case, if the reservation contained in the deed from Bob Slaughter of 1/16 interest in and to all of the oil, gas, and other minerals in and under and that may be produced from the tract of land conveyed was

royalty as distinguished from a mere undivided 1/16 interest in all of the oil, gas, and other minerals, the judgment of the court below was correct and should be affirmed. *If, however, the effect of the reservation was merely to reserve an undivided 1/16 interest in the oil, gas, and other minerals and give to the grantee Watkins authority to lease the land on behalf of the grantor as well as himself, it follows that the interest owned by the appellees was combined with that owned by the appellants and was conveyed to the lessees by the oil and gas lease in the same manner and with the same proportionate reservation of royalty. In that event the interest of the appellees would be only 1/16 of such reservation, which was 1/8 of the oil and gas produced and would be only 1/128 of all of the oil and gas produced.* Murphy v. Dilworth, 137 Tex. 32, 151 S. W. (2d) 1004; Theo Oil Co. v. Thomas, Tex. Civ. App. 108 S. W. (2d) 255; McGill v. Bennett, Tex. Civ. App., 59 S. W. (2d) 473." (Italics added.)

It is patent that the alternatives posed by the Texas Court in the above quotation are an accurate summary of the cases therein and herein cited, and that the latter alternative stated by the Court is an apt description of the case at bar. If, says the Court, the interests are undivided interests, and if one of these interests is coupled with a power to lease, then upon the execution of such lease the interests of both co-tenants pass to the lessee, and each co-tenant is entitled to only his proportionate part of the royalty. Every facet of the present case is covered by this description. Respondent and Petitioner possess undivided interests in the oil in the respective proportions of 95% and 5%, with Respondents possessing

the power to lease the whole of such oil. When and if Respondents exercise such power, the interests of both Respondents and of Petitioner pass to the lessee, and Respondents and Petitioner are entitled to the reserved royalty in the proportions of 95% and 5%.

These rulings by the appellate courts of Texas state with clarity and with precision the respective rights of co-owners of undivided mineral interests which are leased by one of such owners, and every aspect of these decisions supports the judgment of the Circuit Court herein.

In view of such decisions, it is difficult to see how Petitioner can contend that the judgment of the Circuit Court is in conflict with "applicable local decisions" or that the judgment of that Court is "different from what would have been the result in the State Courts." Such a contention is especially difficult to understand when one recalls that Petitioner has cited not one single case which deals with a mineral deed or mineral reservation comparable to those presented in the instant case, and when one perceives that the foregoing Texas cases conclusively lead to the decision of the Circuit Court that Petitioner is entitled to but 5% of the reserved royalty in any lease which is executed in connection with the oil in question, plus 5% of whatever other consideration is received.

After holding that Respondents and Petitioner are co-tenants of the oil which is involved in this suit, and that by virtue of Paragraph 6 of the deed, Respondents possess the power to sell the whole of such oil, provided Petitioner is given 5% of the "purchase price" received upon such sale, the Circuit Court con-

cluded its chain of reasoning by applying principles which are well established in Texas and which are not the subject of dispute by the parties herein. Thus, said the Court, in Texas the power to sell minerals is tantamount to and includes the power to lease such minerals (R. 135). This has long been the settled law of Texas, see 31 Texas Jurisprudence 574-577 and cases cited therein, and the parties to this cause have stipulated that Respondents' power of sale confers upon them the power to execute a mineral lease (R. 44, 133). Following this, the only question remaining before the Circuit Court was to ascertain what constitutes the "purchase price" of any lease which Respondent might execute, and to assign to Petitioner its 5% of such "purchase price." Here again, the question was decided for the Court by settled principles of Texas law. Thus, in *Sheppard v. Standolind Oil & Gas Company*, 125 S. W. (2d) 643 (error refused by Texas Supreme Court), the Court stated:

"Royalty also is on the same footing as bonus, cash, deferred or oil, as regards representing a part of the purchase price for the lease. . . . Consequently anything which the lessor receives, in whatever form, in consideration for the oil taken or to be taken from the land, constitutes a part of the purchase price of the title to the oil, and therefore of the land. State v. Hatcher, 115 Tex. 332, 281 S. W. 192; Andrews v. Brown, Tex. Civ. App. 283 S. W. 288."

Hence, the Circuit Court necessarily held that the "purchase price" for the execution of any lease by Respondents "includes, in addition to any bonus and

delay rentals, the agreed royalty" (R. 135), and the Circuit Court necessarily decided the point at issue in this suit by holding that upon the execution of any such lease, the Petitioner is entitled to 5% of the delay rentals, of the bonus, and of the agreed royalty.

Again, Respondents wish to reiterate that there is no "confusion" or disregarding of "applicable local decisions" in this chain of reasoning and in the decision reached by the Circuit Court. To the contrary, such reasoning stems directly from the very principles which Petitioner claims were disregarded by the Court below, and such principles point squarely to the correctness of the judgment reached by the Cirsuit Court.

3 and 4.

In subdivisions 3 and 4 of its Argument, Petitioner considers the effect of Paragraph 9 of the deed in question, and Petitioner renews its contention that this Paragraph confers upon it a 5% interest in the oil in question which is over and above the 5% interest which it has received elsewhere in the deed. In summary, Petitioner contends that upon the execution of a mineral lease by Respondents, Petitioner should receive its 5% of the agreed royalty, bonus and delay rentals under Paragraph 6 of the deed, and, in addition, that it should receive an extra 5% royalty by virtue of the provisions of Paragraph 9.

This contention was considered and was expressly rejected by the Circuit Court. (R. 135-138.) Throughout its petition for certiorari and supporting argument, Petitioner has sought to create the

impression that the Court's treatment of Paragraph 9 resulted from its failure to discern the distinction between ownership in place and an incorporeal royalty interest. Thus, after stating such distinction, Petitioner avers "The Circuit Court of Appeals has failed to comprehend and apply these fundamentals and distinctions. To it there is no distinction between incorporeal royalty interest and ownership of oil in place, consequently, the key to the proper construction of the deed is lost." (P. 5.)

Far from failing to comprehend and to apply this distinction, the Circuit Court exhibited in its opinion herein a full appreciation and utilization of such distinction. Thus, the Court explicitly stated that the granting clause of the deed creates a co-tenancy based upon ownership in place (R. 134), and, in addition, the Court recognized that Paragraph 9 of the deed creates a royalty interest—a "running covenant," to employ the language of the Court. (R. 137.) Petitioner's real complaint arises, not from the fact that the Circuit Court failed to recognize Paragraph 9 as creating a royalty interest, but rather from the fact that the Circuit Court correctly defined and delineated the circumstances under which such royalty interest is effective.

Thus, the Court held—contrary to Petitioner's contention—that Paragraphs 6 and 9 of the deed obviously could not have been intended to apply to the same factual situation. Under Paragraph 6, Respondents are privileged to sell (or lease) the "whole" of the oil; under the same Paragraph, the purchaser (or lessee) is to obtain the "whole" of the oil; and under Paragraph 7, such purchaser's (or

lessee's) rights and powers with respect to the 5% of the oil in place are to be the same as those with respect to the 95% of the oil in place. The Circuit Court rightly discerned that there is a sharp conflict and incongruity between Paragraphs 6 and 9 if they are construed as being applicable to the same situation, and the Court rightly obviated such inconsistency by assigning to each Paragraph its proper sphere of operation. The Circuit Court succinctly stated its conclusions in this respect as follows (substituting "Respondents" for "Appellants" and "Petitioner" for "Appellee"):

"If the Respondents decide to lease 100% of the oil in place under the power given in paragraph six, paragraphs six and seven are operative, but paragraph nine by construction is inoperative. If Respondents choose to develop the land themselves—as apparently was within the contemplation of the parties to the deed by virtue of paragraphs two to five, inclusive, thereof—paragraph nine entitles the Petitioner to a 5% share of any oil which may be produced. Obviously, paragraphs six and seven would have no application. Likewise, if the appellants choose to sell not the whole (100%) of the oil under paragraph six, but only their undivided 95% interest in the oil in place, the person who succeeds to such share and stands in their shoes as co-tenant also is bound to pay to the Petitioner 5% of all production." (R. 136-137.)

In these words is found a complete refutation of Petitioner's contention that the opinion of the Circuit Court is grounded upon a "contradiction of premises." As viewed through the lenses of Petitioner,

this contradiction results from an alleged belief on the part of the Court that ownership in place and ownership of royalty interest cannot co-exist in the same situation (Pp. 5-6, 21). However, when the language and ruling of the Court are placed in evidence against such allegation, it is patent that the only existent contradiction is that which is present in Petitioner's viewpoint. Plainly, from the language of the Court's opinion as contained on pages 130-139 of the Record, the Circuit Court did not hold that ownership in place and ownership of a royalty interest may not co-exist; neither did it fail to discern the difference between these two concepts. Rather the Court said that the very language of the deed in question negatives the co-existence of these two interests in the same situation, since a purchaser or lessee under the provisions of Paragraph 6 would not obtain the "whole of the oil" and would not obtain the same rights with respect to the 5% as he obtains with respect to the 95% if what he obtains is burdened with the obligation to make an additional 5% royalty payment under Paragraph 9. Moreover, the Circuit Court carefully perceived that the very wording of Paragraph 9 precludes its application to any situation in which a sale or lease is made under Paragraph 6. The Court's keen analysis of this Paragraph is concisely set forth on page 137 of the Record, and in the interests of brevity, Respondents will not repeat such analysis herein. A reading of this analysis, together with those other portions of the Court's opinion which bear upon Paragraph 9, will conclusively show that the Circuit Court did not purport to make any far-

sweeping or general pronouncement with respect to the incompatibility of ownership in place and of royalty interests. Rather, the Circuit Court merely held that under the particular language of this particular deed, the royalty interest contained in Paragraph 9 could not be operative in a situation in which ownership in place was transferred under the provisions of Paragraph 6.

The extent to which the opinion of the Circuit Court necessarily is based upon, and is confined to, the particular language in this particular deed highlights another erroneous impression which might be gleaned from a reading of the petition for certiorari herein. Petitioner would have this Court believe that the opinion below is of earth-shaking importance—that "there are at issue in this cause generally important questions arising under the mineral laws of the State of Texas" (P. 2); and that the great petroleum industry of the State of Texas might be affected by the decision in this cause. (P. 6.) As a matter of plain cold truth, this case involves only the construction of one particular written instrument—an instrument which was executed nearly a half century ago and an instrument whose provisions are so unique and so out of line with standard instruments of its character that it is doubtful if their counterparts exist. Regardless of the way in which this case is eventually decided, it may well be questioned if another similar case will ever arise or if the decision will ever be cited as precedent in a subsequent suit. The case is, of course, of extreme importance to the parties herein, and all parties are highly interested in obtaining a correct adjudication of its

issues, but any suggestion that the suit possesses any significance beyond its importance to the immediate parties is, to say the least, incongruous.

5 and 6.

In subdivisions 5 and 6 of its Argument, Petitioner sets forth somewhat Socratic discussions of the meaning of the terms "sale" and "purchase price" as used in the deed in question. Respondents confess that they are unable to perceive the relevance of such discussions to any disputed point which is presented by the record in this case, but if the discussions have some relevance, Respondents are happy to be able to admit that they agree with virtually every statement contained in such discussions—and doubtless the Circuit Court would also make such an admission since portions of its opinion and of these discussions paraphrase each other.

In subdivision 5, Petitioner muses upon the question of whether or not the power of sale which is contained in Paragraph 6 of the deed includes the power to execute a mineral lease. Interesting as this discussion might be, its importance at this stage of this case is perhaps minimized by the fact that Petitioner stipulated long ago that the power of sale did include the power to lease (R. 43-44, 133), by the fact that the courts of Texas have consistently so held, see 31 Texas Jurisprudence 574-577, and by the fact that Petitioner concludes that "the term 'sale' in Paragraph 6 includes the term 'lease' "—a conclusion which is also shared by Respondents and by the Circuit Court of Appeals (R. 135, 138).

In subdivision 6, Petitioner discusses the meaning of "purchase price" and arrives at the conclusion that, for the purposes of this case, such term includes delay rentals, bonuses and agreed royalties—a conclusion which necessarily follows from the Texas decisions cited by Petitioner on pages 14-20 of its Argument, a conclusion with which Respondents are in accord, and the very conclusion which the Circuit Court recognized (R. 135) in deciding the basic issue in this case—that Petitioner is entitled to only 5% of the delay rentals, bonuses and agreed royalty when the lands in question are leased.

Conclusion

In presenting this Argument in reply to the petition for writ of certiorari, Respondents have attempted to consider the opinion of the Circuit Court of Appeals in light of Petitioner's criticisms of such opinion. Doubtless this has been a task of supererogation, for the opinion of that Court requires no defense. Succinctly and without overlooking a single issue in the case, the Circuit Court has written an opinion herein which stems from basic principles of mineral law and which follows inescapably to the conclusion which is now before this Honorable Court. Respondents submit that this Honorable Court should extend its approval and lend its encouragement to opinions of this character by permitting such opinion to stand as the ultimate decision of this cause.

WHEREFORE, Respondents pray that this Honorable Court deny the petition for writ of certiorari

herein, or, in the alternative, that this Honorable Court affirm the judgment of the Circuit Court of Appeals.

Respectfully submitted,

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